

EXHIBIT 62

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Claim #239 Date Filed: 1/24/2021
Docket #1826 Date Filed: 01/24/2021

K&L GATES LLP
Artoush Varshosaz (TX Bar No. 24066234)
1717 Main Street, Suite 2800
Dallas, TX 75201
Tel: (214) 939-5659
artoush.varshosaz@klgates.com

Stephen G. Topetzes (*pro hac vice*)
1601 K Street, NW
Washington, DC 20006-1600
Tel: (202) 778-9328
stephen.topetzes@klgates.com

A. Lee Hogewood, III (*pro hac vice*)
4350 Lassiter at North Hills Ave., Suite 300
Raleigh, NC 27609
Tel: (919) 743-7306
Lee.hogewood@klgates.com

Davor Rukavina, Esq.
Texas Bar No. 24030781
Julian P. Vasek, Esq.
Texas Bar No. 24070790
MUNSCH HARDT KOPF & HARR, P.C.
3800 Ross Tower
500 N. Akard Street
Dallas, Texas 75202-2790
Telephone: (214) 855-7500
Facsimile: (214) 978-4375
drukavina@munsch.com
jvasek@munsch.com

*Counsel for Highland Capital Management Fund
Advisors, L.P. and NexPoint Advisors, L.P.*

*Counsel for Highland Capital Management Fund
Advisors, L.P. and NexPoint Advisors, L.P.*

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In re: §
§ Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P., §
§ Case No. 19-34054-sgj11
Debtor. §

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TO THE HONORABLE STACEY G.C. JERNIGAN, U.S. BANKRUPTCY JUDGE: **KURTZMAN CARSON CONSULTA**

COME NOW Highland Capital Management Fund Advisors, L.P. (“HCMFA”) and
NexPoint Advisors, L.P. (“NexPoint,” and with HCMFA, the “Advisors”), creditors and parties in
interest in the above-captioned bankruptcy case (the “Bankruptcy Case”), and file this their
Application for Allowance of Administrative Expense Claim (the “Application”), respectfully
stating as follows:

APPLICATION FOR ALLOWANCE OF ADMINISTRATIVE EXPENSE



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I. JURISDICTION AND VENUE

1. The Court has jurisdiction to consider this matter pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b).
2. Venue is proper in this District pursuant to 28 U.S.C. §§ 1408 and 1409.

II. BACKGROUND

A. SHARED SERVICES AGREEMENTS

3. On or about February 8, 2013, HCMFA entered into that certain *Second Amended and Restated Shared Services Agreement* (each such agreement, a “SSA”) with Highland Capital Management, L.P. (the “Debtor”). On or about the same date, NexPoint also entered into a SSA with the Debtor.

4. Under the SSAs, the Debtor agreed to provide the Advisors with certain services, including “all of the (i) finance and accounting services, (ii) human resources services, (iii) marketing services, (iv) legal services, (v) corporate services, (vi) information technology services, and (vii) operations services”

5. The SSAs contain the following detailed cost allocation provisions:

The Actual Cost of any item relating to any Shared Services or Shared Assets shall be allocated based on the Allocation Percentage. For purposes of this Agreement, “Allocation Percentage” means:

- (a) To the extent 100% of such item is demonstrably attributable to HCMFA, 100% of the Actual Cost of such item shall be allocated to HCMFA as agreed by HCMFA;
- (b) To the extent a specific percentage of use of such item can be determined (e.g., 70% for HCMLP and 30% for HCMFA), that specific percentage of the Actual Cost of such item will be allocated to HCMLP or HCMFA, as applicable and as agreed by HCMFA; and
- (c) All other portions of the Actual Cost of any item that cannot be allocated pursuant to clause (a) or (b) above shall be allocated between HCMLP and HCMFA in such proportion as is agreed in good faith between the parties.

6. “Actual Cost” means, with respect to any period [under the SSA], one hundred percent (100%) of the actual costs and expenses caused by, incurred or otherwise arising from or relating to (i) the Shared Services and (ii) the Shared Assets, in each case during such period.”

7. In the event a party wishes to make changes to the shared services under the SSA, “The parties will negotiate in good faith the terms upon which a Service Provider would be willing to provide such New Shared Services to [the Advisors].”

B. PAYROLL REIMBURSEMENT AGREEMENTS

8. On or about May 1, 2018, HCMFA entered into that certain *Payroll Reimbursement Agreement* (each such agreement a “PRA”) with the Debtor. On or about the same date, NexPoint also entered into a PRA with the Debtor.

9. Under the PRAs, the Debtor is entitled to seek reimbursement from the Advisors “for the cost of certain employees who are dual employees of [the Debtor and the Advisors] and who provide advice to registered investment companies advised by [the Advisors] under the direction and supervision of [the Debtor]”

10. The amount of such reimbursement is based on an actual cost allocation formula as follows: “The Actual Cost of any Dual Employee relating to the investment advisory services provided to a Fund shall be allocated based on the Allocation Percentage. For purposes of this Agreement, “Allocation Percentage” means the Parties’ good faith determination of the percentage of each Dual Employee’s aggregate hours worked during a quarter that were spent on” certain matters set forth in the PRA.

11. “Actual Cost” means, with respect to any period [under the PRA], the actual costs and expenses caused by, incurred or otherwise arising from or relating to each Dual Employee, in each case during such period. Absent any changes to employee reimbursement, as set forth in Section 2.02, such costs and expenses are equal to \$252,000 per month.”

12. Section 2.02 provides the mechanism to modify employee reimbursement and also provides, “The Parties will negotiate in good faith the terms of such modification.”

C. BANKRUPTCY FILING AND SUBSEQUENT EVENTS

13. On October 16, 2019 (the “Petition Date”), the Debtor filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code (11 U.S.C. §§ 101 *et seq.*) in the United States Bankruptcy Court for the District of Delaware, thereby initiating the Bankruptcy Case. On or about December 4, 2019, the Bankruptcy Case was transferred to this Court.

14. On January 9, 2020, the Bankruptcy Court entered its *Order Approving Settlement with Official Committee of Unsecured Creditors Regarding Governance of the Debtor and Procedures for Operations in the Ordinary Course* (Dkt. No. 339, the “Settlement Order”).

15. In connection with the Settlement Order, an independent board (the “Board”) was appointed to manage the Debtor’s general partner, Strand Advisors, Inc. (“Strand”). Its members are John S. Dubel, James P. Seery, Jr., and Russel F. Nelms. Several months later, the Board, with court approval, appointed Mr. Seery as the Debtor’s CEO and CRO.

16. As the Bankruptcy Case progressed, the Court expressed concerns about the Debtor’s employees providing certain services to the non-debtor Advisors. As a result, beginning around July 2020, Mr. Seery directed the Debtor to cease providing services to the Advisors as otherwise contemplated under the SSAs and the PRAs.

17. Nevertheless, the Advisors continued to pay for those services under the SSAs and the PRAs consistent with historical practice, despite the fact that the Debtor is not providing all the required services in return. For example, upon information and belief, the Debtor has booked net income from the SSAs of approximately \$10 million since the Petition Date. Given that the SSAs represent actual-cost sharing agreements, said net revenue represents Advisor overpayments under the SSAs—the purpose of the SSAs is not to make a profit. At the same time, the Advisors

have incurred significant additional expense obtaining services elsewhere that the Debtor was required to provide under the SSAs.

18. There have also been similar overpayments under the PRAs. There is a schedule attached to the PRAs of investment professionals whose compensation would be reimbursed by the Advisors. But this schedule is incredibly outdated. It includes many individuals, for example, who departed the Debtor before the Petition Date or during the Bankruptcy Case. As a result, the Advisors estimate that, since the Petition Date, they have overpaid under the PRA's more than \$9 million.

19. The Advisors have brought these issues to Mr. Seery's attention, and in accordance with the Debtor's obligations under the SSAs and the PRAs, the Advisors expect Mr. Seery to negotiate in good faith. Discovery will be necessary to determine the precise amount of the overpayments under the SSAs and PRAs.

III. ARGUMENTS AND AUTHORITIES

20. Administrative expenses generally include "the actual, necessary costs and expenses of preserving the estate" 11 U.S.C. § 503(b)(1)(a). However, the list of administrative expense claims set forth in section 503(b) is not exclusive or exhaustive. *In re Imperial Bev. Group, LLC*, 457 B.R. 490, 500 (Bankr. N.D. Tex. 2011) (citing various cases for the proposition that "the administrative expenses listed in the subsections of § 503(b)—preceded by 'including'—are not exclusive"); 11 U.S.C. § 102(3) ("In this title ... 'includes' and 'including' are not limiting").

21. Post-petition, pre-rejection performance under an executory contract gives rise to an administrative expense claim. *See NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 531 (1984) (superseded by statute on other grounds) ("If the debtor-in-possession elects to continue to receive benefits from the other party to an executory contract pending a decision to reject or assume the

contract, the debtor-in-possession is obligated to pay for the reasonable value of those services"); *In re MCS/Tex. Direct, Inc.*, 02-40229-DML-11, 2004 Bankr. LEXIS 379, *11-12 (Bankr. N.D. Tex. March 30, 2004) ("Even if the contract is rejected, the contract party is entitled to payment for postpetition value received by a debtor.").

22. Similarly, a post-petition, pre-rejection breach of contract gives rise to an administrative expense claim. *See In re United Trucking Serv.*, 851 F.2d 159, 162 (6th Cir. 1988) ("the damages under the breached lease covenant, to the extent that they occurred post-petition, provided benefits to the bankrupt estate and were property accorded priority under § 503"); *Shapiro v. Meridian Auto. Sys. (Del.) (In re Lorro, Inc.)*, 391 B.R. 760, 766 (Bankr. E.D. Mich. 2008) ("the term 'administrative expense' has been construed to include claims based on tort, trademark infringement, patent infringement, and breach of contract") (citing, *inter alia*, *Reading Co. v. Brown*, 391 U.S. 471 (1968)).

23. Here, under the SSAs and the RPAs, the Advisors have paid for services they did not receive and for salaries of employees who no longer exist. The Debtor, on the other hand, collected the Advisors' payments without providing anything in exchange or incurring any actual costs. While the Advisors continued to perform under the SSAs and the RPAs, the Debtor breached its obligations under those same agreements. Accordingly, the Advisors are entitled to an administrative expense claim for the total overpayments, which, upon information and belief, total approximately \$14 million. Because the accounting information related to such costs and expenses are within the exclusive control of the Debtor, discovery will be necessary to determine the precise amount of the overpayments under the SSAs and PRAs.

IV. PRAYER

WHEREFORE, PREMISES CONSIDERED, the Funds and Advisors respectfully request that the Court enter an order granting this Application, awarding them an administrative expense

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claim in an amount to be determined at trial (which is expected to be approximately \$14 million), and providing them such other and further relief to which they show themselves to be entitled, at law or in equity.

RESPECTFULLY SUBMITTED this 24th day of January, 2021.

MUNSCH HARDT KOPF & HARR, P.C.

/s/ Davor Rukavina

Davor Rukavina, Esq.
Texas Bar No. 24030781
Julian P. Vasek, Esq.
Texas Bar No. 24070790
3800 Ross Tower
500 N. Akard Street
Dallas, Texas 75202-2790
Telephone: (214) 855-7500
Facsimile: (214) 978-4375
drukavina@munsch.com
jvasek@munsch.com

K&L GATES LLP

Artouch Varshosaz (TX Bar No. 24066234)
1717 Main Street, Suite 2800
Dallas, TX 75201
Tel: (214) 939-5659
artouch.varshosaz@klgates.com

Stephen G. Topetzes (*pro hac vice*)
1601 K Street, NW
Washington, DC 20006-1600
Tel: (202) 778-9328
stephen.topetzes@klgates.com

A. Lee Hogewood, III (*pro hac vice*)
4350 Lassiter at North Hills Ave., Suite 300
Raleigh, NC 27609
Tel: (919) 743-7306
Lee.hogewood@klgates.com

*Counsel for Highland Capital Management
Fund Advisors, L.P. and NexPoint Advisors,
L.P.*

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of this document was served (A) electronically by the Court's CM/ECF system on all parties entitled to such notice on January 24, 2021; and (B) by first class U.S. mail, postage prepaid, on the attached service list on January 25, 2021.

/s/ Davor Rukavina
Davor Rukavina, Esq.

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Abernathy, Roeder, Boyd & Hullett, P.C.
Chad Timmons, Larry R. Boyd, Emily M. Hahn
1700 Redbud Blvd, Ste. 300
McKinney, TX 75069

Alston & Bird LLP
Jared Slade
Chase Tower
2200 Ross Avenue
Dallas, TX 75201

Alston & Bird LLP
Jonathan T. Edwards
One Atlantic Center
1201 West Peachtree Street
Atlanta, GA 30309

Ashby & Geddes, P.A.
William P. Bowden, Esq., Michael D.
DeBaecque, Esq.
500 Delaware Avenue, 8th Floor
PO Box 1150
Wilmington, DE 19899-1150

Baker & McKenzie LLP
Debra A. Dandeneau
452 Fifth Ave
New York, NY 10018

Baker & McKenzie LLP
Michelle Hartmann
1900 North Pearl
Suite 1500
Dallas, TX 75201

Barnes & Thornburg LLP
Thomas G. Haskins, Jr.
2121 North Pearl Street, Suite 700
Dallas, TX 75201

BBVA
Michael Doran
8080 North Central Expressway
Suite 1500
Dallas, TX 75206

Blank Rome LLP
John E. Lucian, Josef W. Mintz
1201 N. Market Street, Suite 800
Wilmington, DE 19801

Bonds Ellis Eppich Schafer Jones LLP
D. Michael Lynn, John Y. Bonds, III, Bryan C.
Assink
420 Throckmorton Street, Suite 1000
Fort Worth, TX 76102

Buchalter, A Professional Corporation
Shawn M. Christianson, Esq.
55 Second Street, 17th Floor
San Francisco, CA 94105-3493

Butler Snow LLP
Martin A. Sosland and Candice M. Carson
2911 Turtle Creek Blvd.
Suite 1400
Dallas, TX 75219

Carlyon Cica Chtd.
Candace C. Carlyon, Esq., Tracy M. Osteen,
Esq.
265 E. Warm Springs Road, Suite 107
Las Vegas, NV 89119

Chipman, Brown, Cicero & Cole, LLP
Mark L. Desgrosseilliers
Hercules Plaza
1313 North Market Street, Suite 5400
Wilmington, DE 19801

**Cole, Schotz, Meisel, Forman & Leonard,
P.A.**
Michael D. Warner, Esq.
301 Commerce Street, Suite 1700
Fort Worth, TX 76102

Condon Tobin Sladek Thornton PLLC
J. Seth Moore
8080 Park Lane, Suite 700
Dallas, TX 75231

Cross & Simon LLC
Michael L. Vild, Esquire
1105 N. Market Street, Suite 901
Wilmington, DE 19801

Dentons US LLP
Lauren Macksoud, Esq.
1221 Avenue of the Americas
New York, NY 10020-1089

Dentons US LLP
Patrick C. Maxcy, Esq.
233 South Wacker Drive
Suite 5900
Chicago, IL 60606-6361

Frontier State Bank
Attn: Steve Elliot
5100 South I-35 Service Road
Oklahoma City, OK 73129

Frost Brown Todd LLC
Mark A. Platt
100 Crescent Court, Suite 350
Dallas, TX 75201

Gibson, Dunn & Crutcher LLP
Marshall R. King, Esq., Michael A. Rosenthal,
Esq. & Alan Moskowitz, Esq.
200 Park Avenue
New York, NY 10066

Gibson, Dunn & Crutcher LLP
Matthew G. Bouslog, Esq.
3161 Michelson Drive
Irvine, CA 92612

Hayward & Associates PLLC
Melissa S. Hayward, Zachery Z. Annable
10501 N. Central Expy, Ste. 106
Dallas, TX 75231

Heller, Draper & Horn, L.L.C.
Douglas S. Draper, Leslie A. Collins, Greta M.
Brouphy
650 Poydras Street, Suite 2500
New Orleans, LA 70130

Highland Capital Management
300 Crescent Court
Suite 700
Dallas, TX 75201

Hunter Mountain Investment Trust
c/o Rand Advisors LLC
John Honis
87 Railroad Place Ste 403
Saratoga Springs, NY 12866

Internal Revenue Service
Attn Susanne Larson
31 Hopkins Plz Rm 1150
Baltimore, MD 21201

Internal Revenue Service
Centralized Insolvency Operation
PO Box 7346
Philadelphia, PA 19101-7346

Internal Revenue Service
Centralized Insolvency Operation
2970 Market St
Philadelphia, PA 19104

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Jackson Walker L.L.P.
Michael S. Held
2323 Ross Avenue, Suite 600
Dallas, TX 75201

Jefferies LLC
Director of Compliance
520 Madison Avenue, 16th Floor
Re Prime Brokerage Services
New York, NY 10022

Jefferies LLC
Office of the General Counsel
520 Madison Avenue, 16th Floor
Re Prime Brokerage Services
New York, NY 10022

Jenner & Block LLP
Marc B. Hankin, Richard Levin
919 Third Avenue
New York, NY 10022-3908

Jones Day
Amanda Rush
2727 N. Harwood Street
Dallas, TX 75201

Jones Walker LLP
Joseph E. Bain, Amy K. Anderson
811 Main Street, Suite 2900
Houston, TX 77002

K&L Gates LLP
Artoush Varshosaz
1717 Main Street, Suite 2800
Dallas, TX 75201

K&L Gates LLP
James A. Wright III
1 Lincoln Street
Boston, MA 02110

K&L Gates LLP
Stephen G. Topetzes
1601 K Street, NW
Washington, DC 20006-1600

Kane Russell Coleman Logan PC
John J. Kane
901 Main Street, Suite 5200
Dallas, TX 75242-1699

KeyBank National Association
as Administrative Agent
225 Franklin Street, 18th Floor
Boston, MA 02110

KeyBank National Association
as Agent
127 Public Square
Cleveland, OH 44114

King & Spalding LLP
Paul R. Bessette
500 West 2nd St., Suite 1800
Austin, TX 78701-4684

Kurtzman Carson Consultants
Joe Morrow
222 N. Pacific Coast Hwy Ste 300
El Segundo, CA 90245

Kurtzman Steady, LLC
Jeffrey Kurtzman, Esq.
401 S. 2nd Street, Suite 200
Philadelphia, PA 19147

Latham & Watkins LLP
Asif Attarwala
330 N. Wabash Avenue, Ste. 2800
Chicago, IL 60611

Latham & Watkins LLP
Jeffrey E. Bjork
355 South Grand Avenue, Ste. 100
Los Angeles, CA 90071

Linebarger Goggan Blair & Sampson LLP
Elizabeth Weller, Laurie A. Spindler
2777 N. Stemmons Freeway
Suite 1000
Dallas, TX 75207

Loewinsohn Flegle Deary Simon LLP
Daniel P. Winika
12377 Merit Drive, Suite 900
Dallas, TX 75251

Lynn Pinker Cox & Hurst, L.L.P.
Michael K. Hurst, Esq.
2100 Ross Avenue, Ste 2700
Dallas, TX 75201

Mark K. Okada
300 Crescent Court
Suite 700
Dallas, TX 75201

Morris, Nichols, Arsh & Tunnell LLP
Curtis S. Miller, Kevin M. Coen
1201 North Market Street, Suite 1600
Wilmington, DE 19801

Morrison Cohen LLP
Joseph T. Moldovan, Esq. & Sally Siconolfi,
Esq.
909 Third Avenue
New York, NY 10022

NexBank
John Danilowicz
2515 McKinney Ave
Ste 1100
Dallas, TX 75201

Nixon Peabody LLP
Louis J. Cisz, III, Esq.
One Embarcadero Center, 32nd Floor
San Francisco, CA 94111

Office of General Counsel
Securities & Exchange Commission
100 F St NE
Washington, DC 20544

Office of the Attorney General
Ken Paxton
300 W. 15th Street
Austin, TX 78701

Office of the Attorney General
Main Justice Building, Room 5111
10th & Constitution Avenue, N.W.
Washington, DC 20530

Office of the United States Attorney
Erin Nealy Cox, Esq
1100 Commerce Street, 3rd Floor
Dallas, TX 75202

Office of the United States Trustee
Lisa L. Lambert, Esq
1100 Commerce Street, Room 976
Earle Cabell Federal Building
Dallas, TX 75242

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Pachulski Stang Ziehl & Jones LLP
 John A. Morris and Gregory V. Demo
 780 Third Avenue, 34th Floor
 New York, NY 10017-2024

Pachulski Stang Ziehl & Jones LLP
 Richard M. Pachulski, Jeffrey N. Pomerantz,
 Ira D. Kharasch, James E. O'Neill
 919 North Market Street
 17th Floor
 Wilmington, DE 19801

Pachulski Stang Ziehl & Jones LLP
 Richard M. Pachulski, Jeffrey N. Pomerantz,
 Ira D. Kharasch, James E. O'Neill
 10100 Santa Monica Blvd, 13th Floor
 Los Angeles, CA 90067

Pension Benefit Guaranty Corporation
 Michael I. Baird
 Office of the General Counsel
 1200 K Street, N.W.
 Washington, DC 20005-4026

**Perdue, Brandon, Fielder, Collins & Mott,
 L.L.P.**
 Linda D. Reece
 1919 S. Shiloh Rd., Suite 310
 Garland, TX 75042

Potter Anderson & Corroon LLP
 Jeremy W. Ryan, Esq., R. Stephen McNeill,
 Esq. & D. Ryan Slaugh, Esq.
 1313 North Market Street, 6th Floor
 Wilmington, DE 19801

Prime Brokerage Services
 Jefferies LLC
 520 Madison Avenue
 New York, NY 10022

Richards, Layton & Finger PA
 Michael J. Merchant, Sarah E. Silveira
 One Rodney Square
 920 North King Street
 Wilmington, DE 19801

Rochelle McCullough, LLP
 E. P. Keiffer
 325 North St. Paul Street, Suite 4500
 Dallas, TX 75201

Ross & Smith, PC
 Judith W. Ross, Frances A. Smith, Eric
 Soderlund
 700 North Pearl Street, Suite 1610
 Dallas, TX 75201

Schulte Roth & Zabel LLP
 David J. Karp, James V. Williams III
 919 Third Avenue
 New York, NY 10022

Securities & Exchange Commission
 Andrew Calamari, Regional Director
 New York Regional Office
 Brookfield Place, Suite 400
 200 Vesey Street
 New York, NY 10281

Securities & Exchange Commission
 Sharon Binger, Regional Director
 Philadelphia Regional Office
 One Penn Center, Suite 520
 1617 JFK Boulevard
 Philadelphia, PA 19103

Sidley Austin LLP
 Matthew Clemente, Alyssa Russell, Elliot A.
 Bromagen
 One South Dearborn Street
 Chicago, IL 60603

Sidley Austin LLP
 Penny P. Reid, Paige Holden Montgomery,
 Charles M. Person, Juliana Hoffman
 2021 McKinney Avenue Suite 2000
 Dallas, TX 75201

Spencer Fane LLP
 Jason P. Kathman
 5700 Granite Parkway, Suite 650
 Plano, TX 75024

State Comptroller of Public Accounts
 Revenue Accounting Division-
 Bankruptcy Section
 PO Box 13258
 Austin, TX 78711

State of Delaware
 Division of Corporations - Franchise Tax
 401 Federal Street
 PO Box 898
 Dover, DE 19903

Strand Advisors, Inc.
 300 Crescent Court
 Suite 700
 Dallas, TX 75201

Sullivan Hazeltine Allinson LLC
 William A. Hazeltine, Esq.
 901 North Market Street, Suite 1300
 Wilmington, DE 19801

Texas Attorney Generals Office
 Bankruptcy-Collections Division
 PO Box 12548
 Austin, TX 78711-2548

The Dugaboy Investment Trust
 300 Crescent Court
 Suite 700
 Dallas, TX 75201

**The Mark and Pamela Okada Family Trust -
 Exempt Trust #1**
 300 Crescent Court
 Suite 700
 Dallas, TX 75201

**The Mark and Pamela Okada Family Trust -
 Exempt Trust #2**
 300 Crescent Court
 Suite 700
 Dallas, TX 75201

U.S. Department of Justice, Tax Division
 David G. Adams
 717 N. Harwood St., Suite 400
 Dallas, TX 75201

United States Attorney General
 U.S. Department of Justice
 William Barr, Esquire
 950 Pennsylvania Avenue, NW
 Room 4400
 Washington, DC 20530-0001

US Department of the Treasury
 Office of General Counsel
 1500 Pennsylvania Avenue, NW
 Washington, DC 20220

Winstead PC
 Rakhee V. Patel, Phillip Lamberson
 2728 N. Harwood Street, Suite 500
 Dallas, TX 75201

Winston & Strawn LLP
 Attn: David Neier
 200 Park Avenue
 New York, NY 10166-4193

Winston & Strawn LLP
 Attn: Katherine A. Preston
 800 Capitol Street, Suite 2400
 Houston, TX 77002

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Winston & Strawn LLP
Attn: Thomas M. Melsheimer; Natalie L.
Arbaugh
2121 N. Pearl Street, Suite 900
Dallas, TX 75201

Young Conaway Stargatt & Taylor, LLP
Michael R. Nestor, Edmon L. Morton, Sean M.
Beach, Esq., Jaclyn C. Weissgerber, Esq.
Rodney Square
1000 North King Street
Wilmington, DE 19801

Zillah A. Frampton
Bankruptcy Administrator
Delaware Division of Revenue
Carvel State Office Building, 8th Floor
820 N. French Street
Wilmington, DE 19801